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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1090

SAMUEL BERGER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1211

TRAVIS LEVY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. in No. 1090 1a-12a) is reported at 433 F.2d 680.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1970. A petition for rehearing and rehearing en banc was denied on November 11, 1970. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari in No. 1090 to December 12, 1970, and on that date the petition was filed. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari in No. 1211 until January 9, 1971, and on January 7, 1971, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

No. 1090:

1. Whether the trial judge properly denied petitioner Berger's motion for a separate trial.
2. Whether petitioner Berger's Fifth and Sixth Amendment rights were violated when the government summoned him before the grand jury.
3. Whether the trial judge erred when he questioned a juror out of the presence of counsel.

No. 1211:

4. Whether the testimony of government witness Herbert Itkin was properly received into evidence.
5. Whether the trial judge correctly instructed the jury.

STATEMENT

Petitioners were among six defendants named in a three-count indictment returned in the Southern Dis-

trict of New York. The indictment alleged three conspiracies involving two kickbacks to labor union welfare and pension fund officials in violation of 18 U.S.C. 371 and 1954. The two kickbacks were allegedly offered in return for loan commitments to Cashmere Corporation of America ("Cashmere"), a financially ailing manufacturer of sweaters and yarn located in Cleveland, Ohio. One alleged kickback went to Frank Zulferino, president of Local 10 of the International Brotherhood of Production, Maintenance, and Operating Employees ("Local 10"); the other went to Floyd Webb, trustee of the Central States, Southeast and Southwest Area Pension Fund of the International Brotherhood of Teamsters ("Teamsters"). Count One of the Indictment charged that petitioner Levy, Zulferino, and James Plumeri conspired as to both kickbacks. Count Two charged that the same persons conspired with regard to the kickback to Zulferino. Count Three alleged that petitioners Levy and Berger, Zulferino, Robert Graff,[1] and Yvette Feinstein conspired to pay the kickback to Webb.[2] Shiah Arsham,[3] the president of Cashmere, was named as a co-conspirator in all three counts.

Petitioners Levy and Berger, Zulferino, Plumeri, and Feinstein were tried together. The charges against Levy under Count Two and Levy, Berger, and Feinstein under Count Three were the only ones

[1] Graff pleaded guilty on the eve of trial and testified for the government.

[2] Webb died before the indictment was returned.

[3] Arsham testified as a witness for the government.

considered by the Jury; the trial judge had dismissed Count One at the close of the government's case after requiring the government to choose whether that Count or Counts Two and Three would be submitted to the jury (Tr. 3133-3134). The jury found Levy guilty on Count Two and Levy, Berger, and Feinstein guilty on Count Three.[1] Levy was given concurrent sentences of two years and was fined $10,000 on each count. Berger was sentenced to imprisonment for five years and fined $10,000. Feinstein received a suspended sentence and was placed on probation for two years. The court of appeals affirmed the conviction of Levy on Count Two and Berger on Count Three. The convictions of Levy and Feinstein on Count Three were reversed on grounds of insufficient evidence (Pet. App. A.).

At trial the evidence showed that in early 1964 Cashmere needed long-term mortgage financing (Tr. 431, 433, 440). Arsham, who assumed management of the firm in late 1963 (Tr. 427), sought the assistance of petitioner Levy, a Manhattan attorney. In early 1964 Levy and Arsham made a number of unsuccessful attempts to secure mortgage loans for Cashmere (Tr. 441-442). Finally, Levy spoke with New York mortgage broker Stephen Birnbaum[2] about the possibility of obtaining a mortgage loan from a labor union pension fund (Tr. 442-443). In late May,

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[1] The cases of Plumeri and Zulferino were severed after the illness of Plumeri and the death of Zulferino's attorney resulted in mistrials being declared as to them.

[2] Birnbaum testified as a witness for the government under a grant of immunity.

Birnbaum proposed to his associate Herbert Itkin[a] that they work together to secure financing for Cashmere (Tr. 930). Itkin and Levy met in early June, and soon afterwards Itkin asked Plumeri, a New York labor figure, to approach the Furriers Union concerning a loan for Cashmere (Tr. 937, 949-950). Plumeri failed to obtain the loan when Cashmere did not furnish a satisfactory appraisal of its assets (Tr. 990-994, 1004-1005).

Cashmere then sought interim financing to buy time with its creditors until a long-term mortgage loan could be arranged. In late August 1964, Zulferino told Itkin that Local 10 would give Cashmere a written loan commitment for $1.2 million if Cashmere agreed in writing that no loan would actually be made. Zulferino demanded a $24,000 kickback for delivery of the commitment (Tr. 994-999). Itkin told Levy about this opportunity and suggested that such a written commitment might prove useful in persuading banks to make short-term credit available to Cashmere (Tr. 1006). Itkin told Levy that he would need an additional 4% to cover payoffs, and Levy agreed (Tr. 1007, 1011, 1407). Itkin made several cash payoffs to Zulferino (Tr. 999, 1019, 1023) and eventually secured a formal commitment letter from Local 10 purporting to obligate its welfare fund to a $1.2 million mortgage loan to Cashmere (R. 1022-1023). Itkin showed this commitment to Levy. After mentioning the payoffs involved, Itkin demanded from Levy the additional 4% upon which

[a] Itkin testified as a witness for the government.

they had agreed. When Levy postponed payment Itkin gave him the commitment letter minus the signature page (Tr. 1024-1025). At a subsequent meeting in October 1964 Arsham paid Itkin the 4% in the form of three checks totalling $48,000 and Itkin gave Levy the missing page (Tr. 1031-1032). Itkin promised not to cash the checks until Cashmere obtained money on the basis of the commitment (Tr. 639, 1037). The Local 10 commitment letter never proved useful in securing bank credit.

In August 1964, Itkin proposed going to the Teamsters for a loan but Levy replied that he had his own connections there (R. 1009-1010). In November 1964, petitioner Berger asked Graff, a Chicago mortgage broker, if he could assist Cashmere. Graff expressed interest and met in New York with Levy, Berger, Berger's cousin Yvette Feinstein, and Arsham (Tr. 1905-1910). Berger later asked Graff to speak to Webb about obtaining a loan from the Teamsters (Tr. 1920). Graff, at a meeting with Webb in Chicago in the last week in November, told Webb that Berger's client Cashmere wanted to borrow $1.5 million. Graff and Webb agreed that if Webb arranged the loan he would receive a $20,000 kickback (Tr. 1927-1928). Graff then met Berger in New York and told him that Webb would get the loan for a $20,000 kickback. Berger replied that $20,000 was excessive, but Graff told him it had already been promised. Berger and Graff agreed to demand 10% from Cashmere for obtaining the loan (Tr. 1927-1929).

Itkin testified that in November Zulferino reported a call from petitioner Berger to the effect that Berger would get a loan from the Teamsters but needed help with interim loans (Tr. 1073-1078). In mid-December, Itkin, trying to assure payment of his $48,000 (see *supra* p. 6), called a meeting with Plumeri, Zulferino, Arsham and Berger in Berger's office (Tr. 1118-1121). Plumeri threatened to stop the Teamster deal unless Berger would guarantee payment by Arsham of the $48,000 checks.[1] At that meeting Berger asked and obtained $15,000 in interim financing for Cashmere (Tr. 1122-1124).

On March 2, 1965, Arsham received from the Teamsters a written loan commitment for $1.5 million (Tr. 612-613). The commitment was "banked" at the La Salle National Bank in Chicago and Cashmere finally received the funds it needed (Tr. 627-628). Berger suggested to Graff that the best way for Arsham to pay their 10% fee would be a $15,000 check to Graff and a $135,000 check to Eagle Investments, Ltd., a bank in the Bahamas owned by Berger and Graff (Tr. 1979-1980). In late April 1965 Arsham wired $135,000 from a Cleveland bank to Eagle Investments (Tr. 634-635). Graff, who was in the Bahamas waiting for the money, flew to Chicago and paid Webb $20,000 in cash at O'Hare Airport (Tr. 2005-2006). The next day he paid Berger $6,500 in cash in New York (Tr. 2009). In early May Levy and Mrs. Feinstein traveled to the Bahamas and received

[1] The $48,000 was never paid (Tr. 1127).

$22,500 in cash from Jack Smith,[8] an employee of Eagle Investments (Tr. 2667-2669). On May 7, 1965, cash deposits totalling $22,500 were made in five New York bank accounts controlled by Levy (Tr. 2822-2825).

ARGUMENT

1. Petitioner Berger (No. 1090), who was named only in Count Three, argues that it was error to deny his motions for a severance made before and during trial. He contends that the first count, which charged a conspiracy among Levy, Zulferino, and Plumeri with regard to both kickbacks, constituted the justification for a joint trial which disappeared when that count was dismissed. Berger was not, however, named in Count One (or Count Two) so that, as to him the dismissed conspiracy count did not supply the reason either for joinder or denial of a severance.

Counts Two and Three were properly joined under Rule 8(b) Fed. R. Crim. P., with or without Count One, because they were, as the court below held (Pet. 9a) parts of the same series of acts or transactions constituting an offense or offenses. Both the Local 10 and Teamsters payoffs were parts of the continuing efforts by Levy and Arsham to obtain financing for Cashmere by means of kick-backs to labor union officials. At a separate trial on Count Three alone, it would have been legitimate, as part of the background, to develop Cashmere's financial difficulties and its prior unsuccessful attempts to obtain loans in order

[8] Smith testified as a witness for the government.

to account for its willingness to pay the large kickback for the Teamster loan. Thus to some extent, although not in the full detail brought out at the trial, evidence as to the Count Two transaction would properly have been admitted on Count Three. This is particularly true of the evidence as to interim loans to enable Cashmere to stall off creditors while obtaining a loan from the Teamsters, and this evidence was in fact admitted on Count Three (Tr. 1074-1124). Thus, at a trial on Count Three alone, not only would some evidence of the count two transactions have been part of the case, but Itkin would have been a proper witness.[9] Moreover, while the court of appeals found that the evidence was insufficient to show that Levy knew that Webb had been paid an illegal kickback for the Teamster loan (Pet. 8a), the evidence clearly showed that Levy played a significant part in initiating the approach to the Teamsters. With regard to the motions for a severance, Levy's participation in both transactions (which the government and trial court believed to be with guilty knowledge) is further justification for the joint trial.

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[9] Petitioner has endeavored to show that, despite repeated admonitions of the trial judge that much of Itkin's evidence was admissible only on Count Two, Itkin's testimony was unavoidably prejudicial. When read in context the allegedly prejudicial testimony loses much of the coloration petitioner seeks to give it. Thus the remark about payoffs (Pet. No. 1090 p. 6, Tr. 936) manifestly refers to the New York loans (see Tr. 932-936). The alleged "devastatingly prejudicial" testimony that in 1961 and 1962 Itkin had obtained loans from the Teamsters through Wenger was developed by Berger's own counsel on cross-examination of Wenger (Tr. 1856-1859).

2. Berger did not press in the court of appeals but preserved for presentation to this Court the argument that his Fifth and Sixth Amendment rights were violated when he was summoned before the grand jury. He contends that since the government knew he would exercise his privilege against self-incrimination, he should not have been called and forced to invoke those rights at the risk of prejudicing the grand jurors against him. The Constitution does not protect potential defendants from being called before grand juries. *United States* v. *Wolfson*, 405 F. 2d 779, 784-785 (C.A. 2), certiorari denied, 394 U.S. 946; *United States* v. *Winter*, 348 F. 2d 204, 207 (C.A. 2), certiorari denied, 382 U.S. 955. The grand jury had the right and indeed the duty to follow leads wherever they pointed. Even though petitioner had indicated to government counsel that he would not testify, he might have changed his mind when before the grand jury. In any event, it is clear that there was ample evidence against Berger to justify return of the indictment. No evidence of his claim of the privilege was before the jury which tried the case.

3. With respect to the elderly juror who was initially questioned by the judge after it was discovered that she had gone home during deliberations, we rely on the opinion below, which found no prejudice. The trial judge would have been better advised to conduct the initial examination in the presence of counsel, but there is no reason to believe that the juror's responses to him were different from those given when she was questioned again in the presence of counsel.

4. Levy (No. 1211) argues that, because Itkin was an FBI informer, he could not be a co-conspirator whose statements outside of Levy's presence could be used to convict Levy. But the evidence indicated that Itkin did participate criminally in the conspiracy, although he was not named as a co-conspirator in the indictment; he knew his conduct to be criminal (Tr. 1401), had consistently lied to the FBI to conceal his involvement (Tr. 1245, 1247, 1252, 1259, 1279-1280), and kept whatever money he made (Tr. 1744). Thus, Itkin's testimony on direct examination as to his conversation with the conspirators was properly received in evidence against Levy under the hearsay exception for the declarations of co-conspirators made in furtherance of the conspiracy. *Lutwak* v. *United States*, 344 U.S. 604, 616-618; *Krulewitch* v. *United States*, 336 U.S. 440, 442-443. Moreover regardless of his own criminal responsibility, Itkin in any event acted as Levy's agent in the kickback negotiations, establishing a conspiratorial link between Levy and the other conspirators which made their declarations admissible against Levy. *United States* v. *Lev*, 276 F. 2d 605, 608 (C.A. 2), certiorari denied, 363 U.S. 812. In view of the strong efforts to impeach Itkin, it was, as the court below held (Pet. No. 1211 App. A 4-5), proper to allow him to testify as to his reasons for lying to the FBI, particularly in view of the clear instructions of the trial judge as to the purpose of the testimony.

5. Levy's objections to the charge are without merit. This Court has consistently declined to review the rule developed in the Second and Ninth Circuits

that a jury need not be instructed that before it can attribute acts and declarations of co-conspirators to a defendant, it must first find by independent evidence of the acts of the defendant that he was a member of the conspiracy. See, e.g., *United States* v. *Baker*, 419 F. 2d 83 (C.A.2), certiorari denied, 397 U.S. 976; *United States* v. *Naccio*, 373 F. 2d 168 (C.A. 2), certiorari denied, 387 U.S. 906; *Carbo* v. *United States*, 314 F. 2d 718 (C.A. 9), certiorari denied, 377 U.S. 953. See our brief in opposition in *Jacobs* v. *United States*, pending on petition for a writ of certiorari, No. 917, this Term." There is no reason to review that issue here, where the direct testimony of Arsham and Itkin as to their dealings with Levy constituted ample independent evidence of his participation in the conspiracy.

The charge on entrapment was that "the burden is on the defendant to adduce some evidence" that a government agent induced the defendant to commit the offense but that the government had to "prove beyond a reasonable doubt" that the inducement was not the cause of the crime. (Pet. No. 1211 App. A 6). This instruction did not, as claimed, shift the burden of proof to Levy. And the instruction on intent was sufficient, as the court of appeals held (Pet. No. 1211 App. A 5-6).

" We are providing petitioners' counsel with copies of our brief in No. 917.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
FREDERICK W. READ, III,
Attorneys.

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